

## SEPARATE OPINION OF JUDGE SIMMA

*The Court missed an opportunity to clarify a controversial point of law by avoiding to deal with the question whether the exceptio non adimpleti contractus, put forward by the Respondent as a “defence” against the accusation of treaty breach separate, and to be distinguished, from reliance on Article 60 of the 1969 Vienna Convention or on a justification of Greece’s objection to FYROM’s admission to NATO by qualifying it as a countermeasure, still has a right of place in international law — the answer which the Court should have given, is an unqualified “no”: Article 60 of the Vienna Convention is to be understood as exhausting the right, flowing from a primary rule of the law of treaties, to suspend performance of a treaty obligation as a reaction to a prior breach by another part — a countermeasure applied in the same context might to an external observer be hard to distinguish from the operation of Article 60, but would be based on a secondary rule of State responsibility and thus be subject to a different legal régime.*

1. I am in agreement with the findings of the Court with regard to both its jurisdiction and the merits of the case. The only concern I have relates to the way in which the Judgment treats one specific argument advanced by the Respondent, namely the issue of the so-called *exceptio non adimpleti contractus*.

2. To explain my concern and put the matter into context: Greece’s main defence against the Applicant’s accusation of breach of the Interim Accord through the Respondent’s behaviour in the question of the FYROM’s NATO membership was, obviously, to deny such breach altogether and contend that it complied with its obligations under the Accord. But then Greece put forward the alternative argument that even if the Court were to find that the Respondent had violated the Interim Accord, the wrongfulness of Greece’s objection to the admission of the FYROM to NATO would be precluded by — no less than — three justifications (“subsidiary defences”), presented with different degrees of conviction and thus convincingness, as it were, but all based on the allegation of prior breaches of the Interim Accord committed by the Republic of Macedonia: in the first instance by the doctrine of the *exceptio non adimpleti contractus*, secondly, because Greece’s objection could be explained as a response to material breaches of the Accord by the FYROM on the basis of the law of treaties, and thirdly, because Greece’s behaviour could also be regarded as a countermeasure against the FYROM’s preceding breaches recognized as justified by the law of State responsibility.

3. The Judgment ultimately rejects all of these defences, and rightly so. It does so for two reasons: to begin with, the Court was only able to find one single, isolated instance in which the Applicant violated the Interim Accord — a breach discontinued after the Respondent had raised its concern (Judgment, paras. 148-151, 160), and not accepted by the Court as having been material (*ibid.*, para. 163). Furthermore, the Judgment emphasizes that in no case had Greece succeeded in convincing the Court that its objection to Macedonia's admission to NATO had any factual connection with — i.e., was a response to — the Applicant's alleged prior treaty breaches, thus possibly giving rise to the various justifications pleaded (*ibid.*, paras. 161, 163-164). I fully support this finding. I am convinced that before and at the time of NATO's Bucharest meeting, that is, at the time of Greece's objection to FYROM membership of the Alliance in violation of the Interim Accord, nobody responsible for this course of action in Athens thought of this objection as constituting any of the reactions foreseen in international law to counter a preceding treaty breach by the Applicant, as which it was construed after the fact by Greece's counsel in the present litigation, neither in terms of the *exceptio* nor as a reaction to breach allowed by the law of treaties nor as a counter-measure in the technical sense. I have difficulties to view Greece's 2008 action as anything but a politically motivated attempt at coercing the FYROM to back down on the name issue. After having been brought before the Court, what the Respondent then tried *ex post facto* was to hide, somewhat desperately and with a pinch of embarrassment, this show of political force amounting to a treaty breach behind the three juridical fig leaves, presented as "subsidiary defences" by very able counsel (but *ad impossibilia nemo tenetur*). In the Judgment, these arguments got the treatment they deserved.

4. Let me now turn to the specific point on which I take issue with the Court's approach: the way in which the Judgment goes about the evaluation of the *exceptio non adimpleti contractus*, put forward, as I have just described, by Greece as a justification separate, and different, from the other two "defences" of response to breach positioned in the law of treaties and that of State responsibility. Greece presented the *exceptio* as a "general principle of international law" permitting the Respondent to withhold performance of those of its own obligations which are reciprocal to, i.e., linked in a synallagmatic relationship with, the fundamental provisions of the Interim Accord allegedly not complied with by the Applicant (thus the description of the Greek position in the Judgment's paragraph 115). Further (and conveniently), the Respondent contended that "the conditions triggering the exception of non-performance are different from and less rigid than the conditions for suspending a treaty

or precluding wrongfulness by way of countermeasures” (Counter-Memorial of Greece, para. 8.7); thus, the exception “does not have to be notified or proven beforehand . . . There are simply no procedural requirements to the exercise of the staying of the performance through the mechanism of the *exceptio*.” (*Ibid.*, para. 8.26.)

5. The Applicant, on the contrary, doubted the character of the *exceptio* as a general principle of international law and disputed the Greek contention that its own obligations under the Interim Accord are to be regarded as synallagmatic with the Respondent’s obligation not to object stipulated in Article 11, paragraph 1, of the Accord. In the FYROM’s view, Article 60 of the 1969 Vienna Convention on the Law of Treaties provides a complete set of rules and procedures governing responses to material breaches under that law. Furthermore, the Applicant did not accept that the *exceptio* could justify non-performance under the law of State responsibility (thus the summary of the FYROM’s view in paragraph 117 of the Judgment).

6. In the face of such conflicting statements about points of law — arguments playing a non-negligible role in the framing of the Respondent’s case, whether bordering the specious or not —, one would have expected the Court to go to the heart of the matter and engage in a state-of-the-art exercise of clarifying the legal status and interrelationship of the three “defences” invoked by Greece. However, the Court refrained from doing so. Such abstinence will once again disappoint those observers who might have expected some illuminating words on rather controversial questions of law; a decision a little less “transactional” in a matter in which the Court could have afforded to speak out. As concerns the *exceptio non adimpleti contractus* in particular, it appears that the Court openly shies away from taking a stand. Let us see how it deals with the *exceptio* as invoked by Greece: as I have already mentioned, the Court recalls that the Respondent failed to establish breaches of the Interim Accord save in one immaterial instance and to show a connection between that one breach and the Greek objection to the Applicant’s admission to NATO. And then the Judgment continues as follows:

“The Respondent has thus failed to establish that the conditions *which it has itself asserted* would be necessary for the application of the *exceptio* have been satisfied in this case. It is, therefore, unnecessary for the Court to determine whether that doctrine forms part of contemporary international law.” (Judgment, para. 161; emphasis added.)

That much about *jura novit curia*. Why such *Berührungsangst*?

7. As far as I am concerned, I may have become immunized against the Court's apparent *haptophobia* in my academic childhood, having authored my first scholarly article in English on the question of treaty breach and responses thereto more than 40 years ago<sup>1</sup>. So I may be allowed, in all due modesty, to set the record straight and try to compensate the Court's abstinence as to the *exceptio*'s whereabouts and "right to life" with the following brief observations<sup>2</sup>.

8. In its Counter-Memorial the Respondent defines the *exceptio* in accordance with the respective entry in the *Dictionnaire de droit international public*:

"Literally: [the] 'exception of a non-performed contract'. An exception that the injured Parties can invoke because of the non-performance of a conventional agreement by another contractual Party and which allows in turn not to apply in turn the conventional agreement in part or as a whole." (Counter-Memorial of Greece, para. 8.8.)

9. Greece distinguishes the *exceptio* so defined from Article 60 of the Vienna Convention. In its view, while Article 60 presupposes the occurrence of material breaches, the *exceptio* entitles a State to suspend performance of its own obligations vis-à-vis another State in breach of obligations that do not amount to material breaches (*ibid.*, para. 8.28). I have already drawn attention to Greece's further statement according to which the *exceptio* can be resorted to without any procedural preconditions. Lastly, the Respondent argues that "the condition triggering the defence based on the *exceptio non adimpleti contractus* is that the Applicant State has breached its obligations resulting from the Treaty if said provisions are the *quid pro quo* of the allegedly breached obligations of the Respondent" (*ibid.*, para. 8.31; see also CR 2011/10, pp. 30-32, paras. 18-27).

<sup>1</sup> B. Simma, "Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law", in 20 *Österreichische Zeitschrift für öffentliches Recht*, pp. 5-83 (1970). Since, as the French say, *on revient toujours à ses premiers amours*, I have returned to my academic first love in a number of further contributions; cf., B. Simma, "Zum Rücktrittsrecht wegen Vertragsverletzung nach der Wiener Konvention von 1969", in H. Kipp (ed.), *Um Recht und Freiheit. Festschrift für F. A. Freiherr von der Heydte*, pp. 615-630 (1977); "Termination and Suspension of Treaties: Two Recent Austrian Cases", in 21 *German Yearbook of International Law*, pp. 74-96 (1978); Commentary on Article 60 (together with Christian Tams), in O. Corten and P. Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary*, Vol. II, pp. 1351-1378 (2011); "Reciprocity", in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (online edition 2011).

<sup>2</sup> They are essentially based on my earlier publications cited in the preceding note, to which I must refer the reader for a more profound treatment of the matter, as well as on some "work in progress" on responses to breach of treaties.

10. Even before any assessment of the correctness of Greece's views, what becomes apparent already now is that the concept of the *exceptio* flows from the principle of reciprocity. The importance of this notion for the "health" of international law can hardly be overestimated. Reciprocity constitutes a basic phenomenon of social interaction and consequently a decisive factor also behind the growth and application of law. In fully developed domestic legal systems the idea of reciprocity has to a large extent been absorbed and supplanted by specific norms and institutions; immediate, instinctive, raw, reciprocity has been "domesticated", as it were. The lower the degree of institutionalization of a legal order, however, the more mechanisms of direct reciprocity will still prevail as such. Hence, its continuing relevance for international law despite the latter's undeniable movement from bilateralism towards community interest: as long as the international legal order lacks regular and comprehensive mechanisms of centralized enforcement and thus has to live with auto-determination and self-help, reciprocity will remain a major *leitmotiv* — in some instances a constructive force maintaining stability in the law, in some others a threat to that very stability. Reciprocity at the basis of international law thus bears a Janus head: one and the same idea can serve both as a propelling force in the making and keeping of the law and as a trigger in the breakdown of legal order. Focusing on the positive impact of our phenomenon, it will be reciprocal interest in the observance of rules — "each . . . State within the community of nations accepting some subtraction from its full sovereignty in return for similar concessions on the side of the others"<sup>3</sup> — that supplies one, if not the main reason for international law somehow managing to accomplish its tasks, despite the absence of most features considered indispensable by domestic lawyers. The possibility of a State reciprocating in kind a breach of an international obligation will provide a powerful argument for its observance. The idea of reciprocity therefore lies at the root of various methods of self-help by which States may secure their rights. The historical development of these methods provides convincing examples of how "raw" reciprocity has been channelled and civilized by subjecting it to legal limits. In this way, reciprocity has been crystallized into international law's sanctioning mechanisms, among them reprisals (nowadays politically correctly called "countermeasures") and non-performance of treaties due to breach.

11. It is to that second category that the *exceptio* belongs. To use the terms of the law in force on the matter (Article 60 of the 1969 Vienna Convention on the Law of Treaties, on which *infra*), if an international

<sup>3</sup> *The Cristina* (1938), A.C. 485.

treaty has been breached, the other party, or parties, to the treaty may invoke the breach as a ground for terminating it or suspending its operation; such reaction is permissible as a consequence of — and thus depending on — the synallagmatic character of international agreements. Expressed a bit more emphatically: “The rule *pacta sunt servanda* is linked to the rule *do ut des*”<sup>4</sup>; “good sense and equity rebel at the idea of a State being held to the performance of its obligations under a treaty which the other contracting party is refusing to respect”<sup>5</sup>.

12. The functional synallagma thus confirmed to be applicable also in international law has its historical roots in the law of contracts of most legal systems. Its genealogy can be traced back to the ancient Roman law foundations of the civil law tradition (the Roman *bonae fidei iudicia*)<sup>6</sup>, as well as to early English contract law concepts of reciprocity in dependent obligations or mutual promises, the doctrine of consideration, and breach of condition<sup>7</sup>. According to what is probably the majority view in international legal doctrine, the widespread acceptance of the principle in the main legal traditions of the civil and common law systems allows to recognize it as a general principle of law under Article 38, paragraph 1 (*c*), of the Court’s Statute.

13. The question is, of course, the transferability of such a concept developed *in foro domestico* to the international legal plane, respectively the amendments that it will have to undergo in order for such a general principle to be able to play a constructive role also at the international level. The problem that we face in this regard is that in fully developed national legal systems the functional synallagma will operate under the control of the courts, that is, at least, such control will always be available if a party affected by its application does not accept the presence of the conditions required to have recourse to our principle. What we encounter at the level of international law, however, will all too often be instances of non-performance of treaty obligations accompanied by invocation of our principle, but without availability of recourse to impartial adjudication of the legality of these measures<sup>8</sup>. Absent the leash of judicial control, our principle will thus become prone to abuse; the issue of legality will often

<sup>4</sup> M. Bartos in the course of the discussion of what would become Article 60, at the 692nd meeting of the International Law Commission, *Yearbook of the International Law Commission (YBILC)*, 1963, Vol. I, p. 124, para. 30.

<sup>5</sup> H. Waldock, Second Report on the Law of Treaties, commentary to Article 20, para. 1, *YBILC*, 1963, Vol. II, p. 73.

<sup>6</sup> R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, 1990, pp. 801-802, note 133.

<sup>7</sup> *Ibid.*, pp. 803-804.

<sup>8</sup> For extensive references to State practice, see my 1970 article, *op. cit. supra* note 1.

remain contested; a State resorting to unilateral abrogation might have been

“determined for quite other reasons [than an alleged breach] to put an end to the treaty and, having alleged the violation primarily to provide a respectable pretext for its action, has not been prepared to enter into a serious discussion of the legal principles governing the denunciation of treaties on the basis of violations by the other party”<sup>9</sup>.

The frequency of precisely these circumstances in the relevant State practice renders state-of-the-art recognition of the principle’s consecration as customary international law very difficult — a point not always heeded in doctrine.

14. The traditional, “standard”, treatment of the functional synallagma in the international legal literature has thus consisted in its recognition in principle, supported by its apparent matter-of-course-ness, often with a hint to the existence of a respective general principle, but then frequently accompanied by a warning of the danger of auto-determination of its pre-conditions<sup>10</sup>. The complications brought about by the emergence of multilateral treaties did not unduly bother the bulk of the literature.

15. The recognition of our principle dates back to the classic writers of our discipline. According to Hugo Grotius, for instance, “[i]f one of the parties violates a treaty, such a violation releases the other from its engagements. For every clause has the binding force of a condition.”<sup>11</sup> And in the same sense Emeric de Vattel: “[T]he State which is offended or injured by the failure of the other to carry out the treaty can choose either to force the offender to fulfil its promises or can declare the treaty dissolved because of the violation of its provisions.”<sup>12</sup> Similar statements abound in the literature up to the time of the Vienna Convention, to which I will turn shortly.

16. Among the confirmations of the consequences of synallagmatic treaty provisions in the case of breach in the (pre-Vienna Convention) jurisprudence of international courts and tribunals, the voices of Judges Anzilotti and Hudson in their opinions in the case of *Diversion of Water from the Meuse*, decided by the Permanent Court in 1937, are probably most representative. In that case Belgium had contended that by construc-

<sup>9</sup> H. Waldock, Second Report on the Law of Treaties, commentary to Article 20, *op. cit. supra* note 5.

<sup>10</sup> Extensive references in my 1970 article, *op. cit. supra* note 1.

<sup>11</sup> *De Iure Belli ac Pacis Libri Tres*, Vol. II, Chap. 15, para. 15 (1625; English translation from B. P. Sinha, *Unilateral Denunciation of Treaty because of Prior Violations of Obligations by other Party Nine* (1966)).

<sup>12</sup> *Le droit des gens, ou principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains*, Vol. II, Chap. 13, para. 200 (1758; English translation by Fenwick, Carnegie Edition, 1916). For extensive references to the views of early and contemporary writers on our principle, see my 1970 article, *op. cit. supra* note 1.

ting certain works contrary to a nineteenth-century treaty, the Netherlands had forfeited the right to invoke the treaty, and requested the Court to declare that it was entitled to reserve the rights accruing to it from the breaches of the treaty. The Court found that the Netherlands had not breached the treaty and therefore did not pronounce upon Belgium's contention. Judge Anzilotti took a different view, however, and emphasized in his dissenting opinion that he was

“convinced that the principle underlying this submission (*inadimplenti non est adimplendum*) is so just, so equitable, so universally recognized, that it must be applied in international relations also. In any case, it is one of these ‘general principles of law recognized by civilized nations’ which the Court applies in virtue of Article 38 of its Statute.”<sup>13</sup>

In the same vein, Judge Hudson, in his individual opinion in the case, expressed the view

“that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party”.<sup>14</sup>

17. Like any decent principle, ours, too, got a Latin name, respectively a Latin circumscription — in fact not just one, but several: *frangenti fidem non est fides servanda*, *inadimplenti non est adimplendum*, *exceptio non(rite) adimpleti contractus*<sup>15</sup>. Returning to plain English, what is relevant here is that in the overwhelming part of the literature, no distinction was ever, or is currently, made between the maxim *inadimplenti non est adimplendum* and its expression in the form of an *exceptio*; both Latin terms pronounce the same principle — *inadimplenti* in its entirety, the *exceptio* viewed from the position of a State which, upon another contracting party's demand for performance of a treaty obligation, responds in the good old Roman law way by connecting its own non-performance with a breach on the part of the other. This is important in the light of my following point: the “reach” of the codification of our principle in Article 60 of the Vienna Convention.

18. In the work of the International Law Commission on the law of treaties, the provision dealing with breach, Article 60, is essentially based on a proposal made by Special Rapporteur H. Waldock in 1963, that is,

<sup>13</sup> *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*, p. 50 (dissenting opinion Judge Anzilotti).

<sup>14</sup> *Ibid.*, p. 77 (individual opinion Judge Hudson).

<sup>15</sup> It remained for the editors of the *Yearbook of the International Law Commission* to combine the two terms by speaking of a maxim *exceptio inadimplenti non est adimplendum*, and ascribing this strange creation to me: *YBILC*, 1999, Vol. I, p. 165, para. 41.

at a relatively late stage in the legislative history of the Vienna Convention<sup>16</sup>. It developed into a complex Article which, according to the general view, copes quite successfully with the challenge of retaining legal certainty in the face of the many complications in the operation of our principle, in particular of its application to different types of multilateral treaties<sup>17</sup>.

19. What is decisive in the present context, however, is that Article 60 of the Vienna Convention is meant to regulate the legal consequences of treaty breach in an exhaustive way. The exhaustive, conclusive nature of our provision is confirmed by the Convention's Article 42, paragraph 2, which reads as follows:

“2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.”

20. Thus, *extra conventionem nulla salus*; on this point, the Applicant got it quite right (cf. paragraph 5 above). But, as a matter of course, Article 42

<sup>16</sup> For details see my 1970 article, *op. cit. supra* note 1.

<sup>17</sup> Article 60 reads as follows:

“*Termination or suspension of the operation of a treaty as a consequence of its breach*

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
2. A material breach of a multilateral treaty by one of the parties entitles:
  - (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
    - (i) in the relations between themselves and the defaulting State; or
    - (ii) as between all the parties;
  - (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
  - (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.
3. A material breach of a treaty, for the purposes of this article, consists in:
  - (a) a repudiation of the treaty not sanctioned by the present Convention; or
  - (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.
4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.
5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.”

can only reach as far as the Vienna Convention as a whole is intended to reach. This leads us to the Convention's Article 73, according to which its provisions shall not prejudice any question that may arise in regard to a treaty from, *inter alia*, the international responsibility of a State. In the language of the ILC, by now generally accepted and adopted in the literature, the Vienna Convention is designed to provide an exhaustive restatement of the "primary rules" on treaty breach but does not touch upon matters of State responsibility, regulated by "secondary rules" as codified and progressively developed in the ILC's 2001 Articles. In other words, Article 60 has nothing to do with State responsibility, and State responsibility has nothing to do with the maxim *inadimplenti non est adimplendum* or the *exceptio non adimpleti contractus*. The functional synallagma attached to treaties embodying reciprocal obligations finds its (not necessarily Latin) expression entirely in the primary rules of the law of treaties. On the other hand, it is in the law on State responsibility where countermeasures have found their place, and it is justified, indeed necessary, therefore to deal with them separately — as the Parties to our case have done and as our Judgment does —, even though countermeasures resorted to as a consequence of the breach of a treaty may also lead to suspension of provisions of that same treaty, that is, they may "look alike" for practical purposes while being subjected to a different legal régime — a matter to which I have devoted particular attention in my scholarly contributions<sup>18</sup>.

21. Returning to the primary rules on the consequences of a breach of treaty embodied in Article 60, let me emphasize once again that this provision constitutes an exhaustive treatment of the matter. Thus, there is no place left besides it, so to speak, for the *exception* — Article 60 and the régime provided by the Vienna Convention to complete its operation embodies it.

22. I do not want to conceal that in my first publication on the legal régime of treaty breach, I took the view that it would have been advisable for the ILC to leave a — modest — place for the *exceptio* on the side of Article 60, in the sense that an extra-conventional *exceptio* would remain applicable (only) to non-material or immaterial breaches, with Article 60 comprehensively covering the suspension of performance of treaty obligations as a consequence of "material" breaches as defined in that Article. I thus pleaded for some limited room in general international law left for qualitatively proportional responses by a State in the sense that they may be applied in the form of suspension of the reacting State's own performance if, when and as long as that obligation's counterpart duty is violated. This kind of suspension, while constituting a protective measure or remedy with its *sedes materiae* also in the law of treaties, i.e., in the realm

<sup>18</sup> Cf. the writings referred to *supra* in note 1.

of primary rules, would not be covered by Article 60 because Article 60 *de minimis non curat*<sup>19</sup>. As I mentioned in my description of the arguments of the Parties to our case (cf. *supra* paragraph 9), Greece put forward this view, but in effect did not profit from it because it regarded the treaty breaches allegedly committed by the FYROM as “material”. As I regard the matter now, I am not convinced that the solution I considered desirable 40 years ago would be constructive and I do not maintain it. I doubt that it would make sense to let reactions to lesser, immaterial breaches off the leash set up by Article 60, particularly its procedural conditions. Rather, I now join the ranks of those who regard Article 60 as truly exhaustive, that is, totally eclipsing the earlier non-written law on the functional synallagma operating behind treaties. But of course a look across the fence into the realm of State responsibility would still show that the impression of a general *de minimis non curat lex* possibly created by the Vienna Convention’s lack of consideration of breaches not fulfilling the conditions laid down in Article 60 is misleading because if a breach not “material” enough to trigger the responses codified in that Article were nevertheless to constitute an internationally wrongful act under the law of State responsibility, it would still entitle another affected contracting party, as an injured State, to resort to countermeasures, within the limits of proportionality.

23. Article 60 of the Vienna Convention has received the imprimatur by our Court at two earlier occasions, in both instances in ways which confirm that the provision is to be understood as an exhaustive treatment of the consequences of treaty breach under the primary rules of the law of treaties.

<sup>19</sup> Cf. my 1970 article, *op. cit. supra* note 1, pp. 59-60. I was not alone with this concern; it was shared 13 years later by the ILC’s Special Rapporteur, W. Riphagen; cf. his fourth report on the content, forms and degrees of international responsibility, *YBILC*, 1983, Vol. II (Part One), p. 18, para. 98:

“Since Article 60 of the Vienna Convention applies only to material breaches, it would be necessary to cover other cases of reciprocity of the performance of treaty obligations. Indeed, if it appears from the treaty or is otherwise established that the performance of an obligation by a State party is the counterpart (*quid pro quo*) of the performance of the same or another obligation by another State party, the non-performance by the first mentioned State need not be a material breach in order to justify non-performance by the other State.”

On Professor Riphagen’s subsequent proposal of “reciprocal countermeasures”, see *infra* note 28.

24. The first instance was the 1971 Advisory Opinion on *Namibia* in which the Court, among many other issues, dealt with the declaration by the United Nations General Assembly in its resolution 2145 (XXI) of 1966 to the effect that South Africa's mandate over South West Africa/Namibia was to be regarded as terminated due to material breach by the former mandatory<sup>20</sup>. The Court set out by referring rather broadly to the "fundamental principl[e] . . . that a party which disowns or does not fulfil its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship"<sup>21</sup>, as well as to its own earlier jurisprudence according to which the mandate constituted an international treaty<sup>22</sup>. It then stated that Article 60 of the Vienna Convention (at the time of the rendering of the Opinion still nine years away from its entry into force) "may in many respects be considered as a codification of existing customary law on the subject"<sup>23</sup>. Subsequently, the Court applied the law thus presented to the facts of the case and found that the action of the General Assembly had been justified and had reached the desired effect.

25. The second occasion on which the Court applied Article 60 was in its 1997 Judgment in the case of the *Gabčíkovo-Nagymaros Project* between Hungary and Slovakia, in which one of Hungary's arguments was to the effect that it was entitled to terminate the 1977 Treaty on the hydro-electric project on the ground that Czechoslovakia had committed a number of breaches of that treaty<sup>24</sup>. The Court took the view that only material breaches gave an affected State a right to terminate an agreement while

"[t]he violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties"<sup>25</sup>.

Following this statement on the relationship between Article 60 and the law of State responsibility, the Court investigated the breaches alleged by the claimant, in particular Czechoslovakia's Ersatz construction of "Variant C", and arrived at the conclusion that the conditions for the invocation of Article 60-type termination were not fulfilled<sup>26</sup>.

26. In the light of the foregoing, the pre-Vienna Convention *exceptio* is to be declared dead. But I do not want to conclude my opinion without

<sup>20</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, pp. 46-50, paras. 91-104.

<sup>21</sup> *Ibid.*, p. 46, para. 91.

<sup>22</sup> *Ibid.*, pp. 46-47, para. 94.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, pp. 65-67, paras. 105-110.

<sup>25</sup> *Ibid.*, p. 65, para. 106.

<sup>26</sup> *Ibid.*, pp. 66-67, paras. 108-110.

mentioning a recent attempt to resuscitate it, in another legal incarnation, as it were. In the context of the ILC's work on State responsibility and in the course of the second reading of the Commission's draft articles on the subject, Special Rapporteur James Crawford, when dealing with the so-called "Circumstances precluding wrongfulness", proposed a provision, draft article 30*bis*, which had no predecessor in the first-reading text. The proposal read as follows:

*"Article 30bis. Non-compliance caused by prior non-compliance by another State*

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the State has been prevented from acting in conformity with the obligation as a direct result of a prior breach of the same or a related international obligation by another State."<sup>27</sup>

27. Professor Crawford expressly wanted draft article 30*bis* to restate the *exceptio*, recognition of which he thought to find in the PCIJ's *Factory at Chorzów (Jurisdiction)* Judgment as well as in later decisions. In order to provide a further foundation for his proposal, the Special Rapporteur referred to the ILC's prior codification efforts both relating to the law of treaties and on State responsibility; in the context of the latter to proposals made by Special Rapporteur W. Riphagen introducing so-called "reciprocal countermeasures"<sup>28</sup>.

Professor Crawford pleaded for recognition of the *exceptio* as a distinct circumstance precluding wrongfulness because in his view, it was not enough to deal with it under the law relating to the suspension of treaties because that law required a material breach, which was narrowly defined<sup>29</sup>. What we thus see is that the Special Rapporteur wanted to fill what he considered to be a gap in the primary rules of the law of treaties

<sup>27</sup> For a comprehensive analysis of this article by the Special Rapporteur, see his Second report on State responsibility, *YBILC*, 1999, Vol. II (Part One), paras. 316-329.

<sup>28</sup> *YBILC*, 1999, Vol. II (Part Two), pp. 78-79. Professor Riphagen's concept of "reciprocal countermeasures" is to be found in his fifth report on the content, forms and degrees of international responsibility (Part Two of the draft articles), *YBILC*, 1984, Vol. II (Part One), p. 3. In draft Article 8, Riphagen proposed to express this concept as follows:

"Subject to . . . [certain other provisions governing countermeasures], the injured State is entitled, by way of reciprocity, to suspend the performance of its obligations towards the State which has committed an internationally wrongful act, if such obligations correspond to, or are directly connected with, the obligation breached." (*Ibid.*)

This proposal was not discussed by the Commission until 1992, when it was rejected; see, *YBILC*, 1992, Vol. II (Part Two), p. 23, para. 151. For a critique, see B. Simma, "Grundfragen der Staatenverantwortlichkeit in der Arbeit der *International Law Commission*", 24 *Archiv des Völkerrechts*, pp. 393-395 (1986).

<sup>29</sup> *YBILC*, 1999, Vol. II (Part Two), p. 79.

(Art. 60) by a secondary rule belonging to the realm of State responsibility.

28. Draft article 30*bis* got a mixed reception in the Commission, to put it mildly<sup>30</sup>. As was to be expected, criticism focused on the relationship between the State-responsibility re-appearance of the *exceptio* now proposed and its expression in the Vienna Convention on the Law of Treaties; the point was made that the proposed article brought together several concepts that were only partially interrelated<sup>31</sup>. Overall, the debate was quite confused; for instance, while according to one suggestion, the content of article 30*bis* really belonged to the concept of *force majeure* — an idea which not only the Special Rapporteur found rather odd —, another member regarded the provision as “reflecting a special department of impossibility”; again others were reminded of the “clean hands” principle<sup>32</sup> and so forth. In light of this, the Commission did well in finally scrapping this doctrinal cross-breed. In its final report upon adoption of the 2001 Articles on State responsibility, it waved goodbye to the proposal made in draft article 30*bis* by confirming once again that “the exception of non-performance (*exceptio inadimpleti contractus*) is best seen as a specific feature of certain mutual or synallagmatic obligations and not a circumstance precluding wrongfulness”<sup>33</sup>.

29. Let me summarize: in the present case, the Court would have had the opportunity to clarify a number of legal issues arising from the Respondent’s “defences” against the Applicant’s accusation of treaty breach, in particular, by giving an authoritative answer to the question whether Article 60 of the Vienna Convention on the Law of Treaties still leaves some place for the so-called *exceptio non adimpleti contractus*. For some reason, the Court avoided touching upon these issues. In my view, the correct answer would have to be negative: on the plane of international law’s primary rules, Article 60 regulates the legal consequences of treaty breach in an exhaustive way; thus no version of the *exceptio* has survived the codification of the law of treaties — may it rest in peace.

(Signed) Bruno SIMMA.

<sup>30</sup> Cf. *YBILC*, 1999, Vol. I, pp. 165-171, and the summary of the discussion; *ibid.*, 1999, Vol. II (Part Two), p. 79.

<sup>31</sup> *Ibid.*

<sup>32</sup> Cf. *ibid.*

<sup>33</sup> Report of the Commission to the General Assembly on the Work of its Fifty-Third Session, *YBILC*, 2001, Vol. II (Part Two), p. 72, para. 9.